

**Letter of Findings Number: 02-20130213**  
**Sales Tax**  
**For Tax Years 2009-11**

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**ISSUES**

**I. Sales Tax—Imposition.**

**Authority:** IC § 6-2.5-2-1; IC § 6-2.5-3-7; IC § 6-2.5-4-1; IC § 6-2.5-9-3; IC § 6-8.1-5-1.

Taxpayer protests the imposition of sales tax.

**II. Tax Administration—Negligence Penalty.**

**Authority:** IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of ten percent negligence penalty.

**STATEMENT OF FACTS**

Taxpayer is an out-of-state corporation in the paint business with Indiana sales and operations. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not collected and remitted the proper amount of Indiana sales tax as a retail merchant for the tax years 2009, 2010, and 2011. The Department therefore issued proposed assessments for sales tax, ten percent negligence penalty, and interest for all three tax years. Taxpayer protested that the Department's proposed assessments of sales tax were too high. Taxpayer also protested the imposition of the ten percent penalties. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

**I. Sales Tax—Imposition.**

**DISCUSSION**

Taxpayer protests a portion of the Department's proposed assessments of sales tax for the years 2009-11. The Department determined that additional sales tax was due after conducting a sample and projection calculation of Taxpayer's total sales. The Department compared Taxpayer's taxable sales and total sales to arrive at an "error percentage" which was applied to total sales for all three tax years at issue. The resulting number was determined to be taxable sales which were underreported. The Department therefore imposed sales tax on those amounts to arrive at sales tax which should have been collected and remitted. Taxpayer states that several of its customers listed as taxable were actually exempt and should be removed from the Department's error percentage calculations. Also, Taxpayer states that three accounts were internal tracking accounts which did not reflect actual sales to customers. Taxpayer therefore believes that those amounts should also be removed from the Department's error percentage calculations. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

The sales tax is imposed by IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state. (Emphasis added).

The Department also refers to IC § 6-2.5-4-1, which states in relevant part:

- (a) A person is a retail merchant making a retail transaction when he engages in selling at retail.
- (b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:
  - (1) acquires tangible personal property for the purpose of resale; and
  - (2) transfers that property to another person for consideration.
- (c) For purposes of determining what constitutes selling at retail, it does not matter whether:
  - (1) the property is transferred in the same form as when it was acquired;
  - (2) the property is transferred alone or in conjunction with other property or services; or
  - (3) the property is transferred conditionally or otherwise.

....

Next, IC § 6-2.5-9-3 provides:

An individual who:

- (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and
- (2) has a duty to remit state gross retail or use taxes (as described in [IC 6-2.5-3-2](#)) to the department;

holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state. If the individual knowingly fails to collect or remit those taxes to the state, he commits a Class D felony.

(Emphasis added).

Therefore, when a retail merchant does not collect and remit the proper amount of sales tax on its sales to its customers, the retail merchant is liable for that sales tax.

In this case, Taxpayer states that the Department included sales found in its records as taxable which were actually to exempt customers. In support of this position, Taxpayer provided exemption certificates for three customers. The Department refers to IC § 6-2.5-3-7, which states:

(a) A person who acquires tangible personal property from a retail merchant for delivery in Indiana is presumed to have acquired the property for storage, use, or consumption in Indiana, unless the person or the retail merchant can produce evidence to rebut that presumption.

(b) A retail merchant is not required to produce evidence of nontaxability under subsection (a) if the retail merchant receives from the person who acquired the property an exemption certificate which certifies, in the form prescribed by the department, that the acquisition is exempt from the use tax.

(Emphasis added).

Therefore, a retail merchant is not required to collect and remit sales tax on sales to resellers if the retail merchant receives exemption certificates from their customers, as provided by IC § 6-2.5-3-7.

After review of the three exemption certificates provided in the course of the hearing process, the Department is unable to agree that these documents support Taxpayer's position. As provided by IC § 6-2.5-3-7(b), a retail merchant is not required to produce evidence of nontaxability if the retail merchant receives an exemption certificate which certifies that the purchaser is exempt from tax. In this case, the three exemption certificates provided during the protest process are all dated in the year 2012, which is after the audit years. Therefore, Taxpayer, as a retail merchant, did not receive these exemption certificates at the time of the sales and so these exemption certificates do not support Taxpayer's position.

Regarding the three accounts which Taxpayer states reflect internal inventory tracking, Taxpayer has provided additional explanation of the nature of these accounts. The accounts were internal tracking of components which were incorporated into Taxpayer's products and were not sales to Taxpayer's customers. Therefore, the amounts listed in these accounts were not retail transactions subject to sales tax under IC § 6-2.5-2-1.

In conclusion, Taxpayer's protest regarding the three exemption certificates is denied. Those certificates were not received until after the audit period and cannot be accepted. Taxpayer's protest regarding the three internal inventory tracking accounts is sustained. The Department will remove the amounts found in those accounts and will recalculate the error percentage. The recalculated error percentage will be applied to Taxpayer's total sales and revised billings will be sent to Taxpayer reflecting these adjustments.

#### FINDING

Taxpayer's protest is sustained in part and denied in part.

#### II. Tax Administration - Negligence Penalty.

The Department issued proposed assessments for sales tax and the ten percent negligence penalty for the tax years in question. Taxpayer protests the imposition of penalty. The Department refers to IC § 6-8.1-10-2.1(a), which states in relevant part:

If a person:

...

(3) incurs, upon examination by the department, a deficiency that is due to negligence;

...

the person is subject to a penalty.

The Department refers to [45 IAC 15-11-2\(b\)](#), which states:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

[45 IAC 15-11-2\(c\)](#) provides in pertinent part:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section.

In this case, Taxpayer incurred a deficiency which the Department determined was due to negligence under

[45 IAC 15-11-2](#)(b), and so was subject to a penalty under IC § 6-8.1-10-2.1(a). Taxpayer has affirmatively established that its failure to pay the deficiency was due to reasonable cause and not due to negligence, as required by [45 IAC 15-11-2](#)(c).

**FINDING**

Taxpayer's protest is sustained.

**SUMMARY**

Taxpayer's protest is sustained in part and denied in part on Issue I regarding the imposition of additional sales tax. Taxpayer's protest is sustained on Issue II regarding the imposition of negligence penalty.

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